



AP/ITW

**BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of : John T. Pienkos
Serial No. : 10/783,540
Filing Date : February 20, 2004
For : Stuffed Dough Pocket With Grasping Extension
Confirmation No. : 7442
Group Art Unit : 1794
Examiner : Weinstein, Steven L.

CERTIFICATION OF SUBMISSION

I hereby certify that, on the date shown below, this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Mail Stop Appeal Brief – Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

Date: 10/27/08 J. S. Pienkos

**Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450**

Dear Sirs:

APPEAL BRIEF UNDER 37 C.F.R. §41.37

This Appeal Brief is being filed pursuant to 37 C.F.R. §41.37 subsequent to the Applicant's filing of the Notice of Appeal on August 28, 2008. Accompanying this submission is the fee set forth under 37 C.F.R. §41.20(b)(2).

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I. REAL PARTY IN INTEREST

The real party in interest is John T. Pienkos.

II. RELATED APPEALS AND INTERFERENCES

There are no prior pending related applications or patents that are under appeal, or the subject of an interference proceeding, or the subject of a judicial proceeding.

III. STATUS OF CLAIMS

Claims 1-3, 5-11, 13 and 21-23 are on appeal and are shown in the Claims Appendix.
Claims 4, 12, 14-20 and 24-26 are cancelled.

IV. STATUS OF AMENDMENTS

All amendments have been entered.

V. SUMMARY OF CLAIMED SUBJECT MATTER

All of the claims under appeal are drawn to various embodiments of an apparatus that is at least partly consumable. The sole independent claim is claim 1.

Regarding the recited elements of claim 1, the “pocket formed from dough” can be understood in at least one example as taking generally the form of a pierogi 105 as shown in FIG. 2(C) and described at paragraphs 0032-0033 of the present Application (which are from line 29 of page 10 through line 2 of page 12), but also in other embodiments can be understood as taking the form of other pockets formed from dough such as a ravioli (see, e.g., paragraph 0023, which is from line 20 on page 6 of the Application to line 4 of page 7 of the Application).

With respect to the language of claim 1 specifying that “the pocket has a length dimension, a width dimension and a depth dimension, and wherein each of the width dimension and the length dimension is substantially greater in extent than the depth dimension”, these are well-known features of pierogies generally. In this regard, referring to FIG. 1(C) of the Application, an exemplary pierogi 5 both is shown to have a length dimension (e.g., along a first axis that is substantially along a backside 36) and a width dimension (e.g., along a second axis that is substantially perpendicular to the first axis). Further referring to FIG. 1(D), each of the length and width dimensions of the pierogi 5 are substantially greater than a depth dimension of the pierogi (e.g., a thickness of the pierogi as can be viewed in FIG. 1(D), as measured along a third axis that is substantially perpendicular to each of the first and second axes). Further, it is well understood that a pierogi will include a “portion of a food stuffing material captured within the pocket”, as described at paragraph 0024 of the present Application (see, e.g., lines 18-19 of page 7).

Additionally, with respect to the language of claim 1 specifying that the protrusion is “coupled to the pocket along at least most of a 90 degree segment around a perimeter that extends around the pocket and substantially encompasses the length dimension and the width dimension, wherein the protrusion is capable of being grasped and, when so grasped, the pocket is capable of being supported by the protrusion”, this language finds support in paragraph 0032 of the present Application (specifically, lines 1-12 of page 11).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Whether claims 1-3, 5-11, 13, and 21-23 are unpatentable under 35 U.S.C. 103(a) as being obvious over Kienle (German patent no. DE4120385) in view of Woods et al. (U.S. Patent No. 6,423,357), Potter (U.S. Patent No. 3,384,495), Hsieh (U.S. Patent Application Publication No. 2004/0018276), Kojima (U.S. Design Patent No. D405,936), the Gordon patents (U.S. Design Patent Nos. D195,498, D194,780, D193,542 and D193,541), Seyfert (U.S. Design Patent No. D309,210), Gansle (U.S. Design Patent No. D67,885), Hreschak (U.S. Design Patent No. D212,070), Teras (U.S. Patent Application Publication No. 2002/0132029), Maric (U.S. Patent Application Publication No. 2006/0040020), Odom (U.S. Patent Application No. 2004/0011223), Burt (U.S. Patent No. 1,718,997), and Kaufman (U.S. Patent No. 3,331,626), further in view of the Applicant's admission of prior art.

VII. ARGUMENT

Independent Claim 1 and Claims 2-3, 5-11, 13, and 21-23 Depending Therefrom

The Examiner rejected independent claim 1, as well as claims 2-3, 5-11, 13, and 21-23 depending therefrom, under 35 U.S.C. 103(a) as being unpatentable over Kienle in view of numerous other references (including the Applicant's admitted prior art) mentioned above.

The Applicant respectfully traverses this rejection. As discussed in further detail below, as best as the Applicant can determine, neither Kienle nor any of the other references relied upon by the Examiner discloses all of the features of the Applicant's pending claim 1. Further, as best as the Applicant can determine, neither Kienle nor any of the other references provides any suggestion to modify and/or combine those references so as to arrive at the Applicant's claim 1 invention. Indeed, the Applicant submits that, as best as the Applicant can determine, neither Kienle nor any of the other references addresses particular problems that are addressed by the Applicant's claim 1 invention, and that the Applicant's claim 1 invention offers particular advantages that are not achieved by either Kienle or any of the other references. Consequently, the Applicants submit that it would not have been obvious to one of ordinary skill in the art to arrive at the Applicant's claim 1 invention in view of these references.

Independent claim 1 recites "a protrusion coupled to the pocket along at least most of a 90 degree segment around a perimeter that extends around the pocket and substantially encompasses the length dimension and the width dimension". The Applicant has not been able to find disclosure of this particular feature within any of Kienle or the other relied-upon references. Further, from the comments provided on pages 2-4 of the Office action mailed on April 28, 2008, it appears to the Applicant that the Examiner acknowledges that none of the relied-upon references discloses this feature.

While apparently agreeing that neither Kienle nor any of the other relied-upon references discloses the aforementioned feature of claim 1, the Examiner further states as follows on page 3 of the aforementioned Office action:

Once it was known to provide a food product, including one that is
a composite food product, comprising a dough enclosed, food

stuffing material, the particular dimensions of the food product, including the protrusion, is seen to have been an obvious result effective variable and/or an obvious matter of choice and/or design. . . . As for the extent and size of the projection, since Kienle, and the art taken as a whole, discloses edible, inedible and even edible/inedible composite handles, associated with food products to allow one to manipulate the food product, the particular dimension and extent of the handle, vis-à-vis the rest of the product, would have either been an obvious result effective variable, routinely and obviously determinable or an obvious matter of choice and/or design.

Notwithstanding these comments, the Applicant respectfully disagrees that it would have been obvious to one of ordinary skill in the art to modify and/or combine Kienle and/or any of the other relied-upon references (or the Applicant's admitted prior art) to arrive at the Applicant's claim 1 invention. The Applicant in particular submits that, even if the Examiner is able to show examples of food products having handles, this in and of itself is inadequate support for the view that the particular special protrusion feature recited in the Applicant's claim 1 would have been obvious as a "result effective variable", a "matter of choice and/or design", or otherwise. To the contrary, the Applicant submits that he has been unable to find any teaching, suggestion or motivation within any of the relied-upon references to modify and/or combine those references so as to arrive at an apparatus with "a protrusion coupled to [a] pocket along at least most of a 90 degree segment around a perimeter that extends around the pocket and substantially encompasses the length dimension and the width dimension".

Further, the Applicant respectfully submits that this lack of any teaching, suggestion or motivation to modify and/or combine the relied-upon references to arrive at this feature is not surprising, since the Applicant's claim 1 invention addresses particular problems and achieves particular advantages that none of the relied-upon prior art references appears to address or achieve.

More particularly in this regard, the Applicant respectfully submits that a stuffed dough pocket is difficult to eat with one's hands because (among other thing) a stuffed dough pocket such as a pierogi or a ravioli is typically not a hard, rigid structure but rather tends to be rather soft and flexible. If a protrusion/extension of such a stuffed dough pocket at one of its ends (e.g., such as the embodiment shown in FIG. 2(B) of the present Application) is used by a consumer to support the stuffed dough pocket such that the stuffed dough pocket extends horizontally away from the consumer's fingers, such protrusion/extension also will likely be somewhat soft and flexible, or at least a region interconnecting that protrusion/extension with the stuffed dough pocket will likely be soft and flexible. Consequently, such an "end-attached" protrusion/extension does not afford a consumer a high degree of control in supporting the stuffed dough pocket. Rather, the stuffed dough pocket may sag relative to the protrusion/extension, if it does not break off from that protrusion/extension completely. As a result, there is a significant chance that the consumer will have difficulty eating the stuffed dough pocket, or even possibly experience a situation where the stuffed dough pocket breaks off completely from its protrusion/extension while manipulating the stuffed dough pocket.

By comparison, the Applicant submits that the Applicant's claim 1 invention allows a consumer to achieve a higher degree of control and support with respect to a stuffed dough pocket that facilitates the consumer's manipulation and eating of the stuffed dough pocket. First, because the protrusion as recited in claim 1 extends along at least most of a 90 degree segment around a perimeter that extends around the pocket, where the perimeter extends around the larger (length and width) dimensions of the pocket, the protrusion directly interconnects with a considerably larger portion of the exterior of the stuffed dough pocket than is the case with an "end-attached" protrusion/extension such as that shown in FIG. 2(B) of the present Application. It is believed by the Applicant that, given the manner and extent of interconnection between the protrusion and the stuffed dough pocket of the Applicant's claim 1, a consumer holding the stuffed dough pocket necessarily has greater control over the movement of the stuffed dough pocket than is the case using an "end-attached" protrusion, and is less likely to experience a situation where the stuffed dough pocket completely disconnects from the protrusion.

Even more significantly, as can be appreciated from FIG. 2(C) of the present Application, the extent and configuration of a protrusion such as that recited in the Applicant's claim 1 allows

a consumer to support a stuffed dough pocket by holding the protrusion in a particular manner such that the stuffed dough pocket extends not only horizontally outward away from the consumer's fingers but also substantially "hangs downward" from the consumer's fingers since a good portion of the stuffed dough pocket is located physically beneath a portion of the protrusion. The Applicant believes that, assuming that the stuffed dough pocket is supported in this manner by way of the protrusion, there will be a reduced amount of sagging and a reduced likelihood of breakage of the stuffed dough pocket with respect to the protrusion (e.g., due to a reduced amount of gravity-induced torque experienced between the protrusion and the main body of the stuffed dough pocket) than would likely occur if the protrusion was an end-attached protrusion/extension.

Therefore, the type of protrusion recited in the Applicant's claim 1 particularly addresses problems associated with, and is advantageous in facilitating, the manipulation of stuffed dough pockets in a controlled manner. Again in this regard, the Applicant's claim 1 invention particularly enhances the chances that a consumer eating a stuffed dough pocket will be able to easily direct the stuffed dough pocket to the consumer's mouth with reduced sagging and less chance of the stuffed dough pocket unexpectedly disconnecting from the protrusion.

In contrast to the above discussion regarding the Applicant's claim 1 invention, as best as the Applicant can determine, none of Kienle or any of the other relied-upon references appears to be directed to addressing the above-discussed problems or appears to provide the above-discussed advantages that are provided by the Applicant's claim 1 invention. Thus, it is not surprising that none of Kienle or any of the other relied-upon references lacks an appropriate teaching, suggestion or motivation that would result in the Applicant's claim 1 invention.

With respect to Kienle in particular, that reference appears to show a structure having an end-attached protrusion/extension. Consequently, Kienle suffers from the same types of disadvantages as are suffered by the embodiment of FIG. 2(B) shown in the present Application and discussed above. More particularly, nowhere can the Applicant find within Kienle any disclosure or suggestion of utilizing other than an end-attached protrusion/extension. Indeed, the Applicant cannot find within Kienle any indication that there exist any particular problems relating to the controlled manipulation of the stuffed dough pocket, much less problems

associated with sagging of the stuffed dough pocket or breakage of the protrusion off of the remainder of the structure. Rather, it appears to the Applicant that Kienle merely recognizes the desirability of a protrusion/extension in general, without recognizing the particular problems engendered by an end-attached protrusion extension.

As for the other references relied upon by the Examiner, as best as the Applicant can determine, none of these other references addresses these deficiencies of Kienle. That is, none of the other relied-upon references appears to address any of the aforementioned problems that are addressed by the Applicant's invention, or provide the aforementioned advantages of the Applicant's claim 1 invention, and thus it is not surprising that none of these other references provides any suggestion that would result in the Applicant's claim 1 invention.

More particularly in this regard, the Applicant provides the following comments regarding each of the additional patent references relied upon by the Examiner:

With respect to each of Woods et al., Potter, Hsieh, and Teras et al., as best as the Applicant can determine, each of those references appears to relate to either an edible cup (Woods et al.) or an edible scoop (Potter, Hsieh and Teras et al.) that is an open-ended (e.g., "concave") structure. As such, none of these references relates to a stuffed dough pocket where the pocket is rather soft and flexible since, to the contrary, each of the structures disclosed in these references appears to necessarily be made of a substantially rigid material so that food material does not spill out of the structures (see, e.g., col. 4, line 64 through column 5, line 5 of Woods et al., col. 1, lines 62-66 of Potter, paragraph 0020 describing the "breakage" of the scoop in Hsieh, and paragraph 0080 of Teras et al.). Consequently, none of these references has any need to address the above-described problems, or any need to achieve any of the above-described advantages, relating to the controlled manipulation of a soft, flexible stuffed dough pocket.

As for each of Kojima, the Gordon patents, Seyfert, Gansle, and Hreschak, although not much detailed disclosure is provided in any of these design patents, it appears to the Applicant that each of these patents also relates to either an edible cup (or cone) or an edible scoop that is open-ended in design and presumably made of a rigid material. Consequently, each of the comments made above with respect to Woods et al., Potter, Hsieh and Teras appear to be equally applicable with respect to each of these design patents.

With respect to Maric, that patent application document discloses numerous different embodiments of food products. However, as best as the Applicant can determine, none of these embodiments addresses any problems pertaining to, or advantages associated with, achieving controlled manipulation of a soft, flexible stuffed dough pocket. Indeed, as best as the Applicant can determine, Maric does not at all relate to stuffed dough pockets, much less a stuffed dough pocket with a protrusion coupled to the pocket along at least most of a 90 degree segment around a perimeter that extends around such a pocket.

More particularly, a first set of embodiments shown in FIGS. 1-25 and 29 of Maric do not appear to the Applicant to be a pocket at all, but rather appear to be solid pieces of food material. Additionally, while a second set of embodiments (actually merely a single embodiment) shown in FIGS. 26-28 of Maric is a product in which food material may be contained, the Applicant is unable to find any indication that the exterior housing of the product is a stuffed dough pocket, or even any indication that the exterior housing of the product is edible. Further, as best as the Applicant can determine, the space within the housing within which is positioned the food material extends throughout the housing, such that there does not appear to be any identifiable protrusion/extension that is distinguishable from the housing itself. Additionally, with respect to a third set of embodiments shown in FIGS. 30-31, as with respect to Woods et al. these embodiments appear to involve open-ended cavities that neither are stuffed dough pockets nor contain any food stuffing material. Also, as with the embodiments of FIGS. 26-28, the Applicant cannot find any indication that the bodies of these structures are made of stuffed dough or are edible.

As for Odom and Burt, each of these references appears to have been cited as being representative of a food item that is supported by way of a skewer/stick, with Odom in particular allowing for the possibility of the skewer being edible (see, e.g., paragraph 0016). As best as the Applicant can determine, these references might have relevance with respect to the patentability of a claim encompassing the subject matter of FIG. 2(A) of the Specification of the present Application (which is described in detail at paragraph 0030). Yet the Applicant does not understand the particular relevance of these references to the Applicant's pending claim 1, given the characteristics of the protrusion required by this claim. It further appears to the Applicant that these references presume that the preferred manner of supporting a food structure is by

providing a rigid “backbone” that, even if edible, is of a significantly harder consistency than the food it is supporting. The Applicant’s claim 1 invention by comparison is capable of encompassing a protrusion that is of the same or a similar consistency to the stuffed dough pocket it supports, and thus can be less obtrusive to a consumer eating the stuffed dough pocket and also can be made from the same material (e.g., the same dough) as the exterior of the stuffed dough pocket.

As for Kaufman, this reference appears to have been cited as being representative of a specialized holding utensil that can be employed in combination with a food item such as a doughnut (see, e.g., col. 1, lines 23-24). While perhaps relevant to the subject matter of FIGS. 5A-6 of the Specification of the present Application, the Applicant does not understand the relevance of this reference to the subject matter of the Applicant’s claim 1. As with many of the other references discussed above, the Applicant is unable to find within Kaufman any particular discussion regarding how to provide a protrusion that would facilitate the controlled manipulation of a rather soft, flexible stuffed dough pocket having a tendency to sag or break relative to the protrusion.

In view of all of the above considerations, therefore, the Applicant respectfully submits that the Applicant’s independent claim 1 is allowable under 35 U.S.C. 103(a) in view of any and all of the references relied upon by the Examiner, alone and/or in combination. Further, in view of the allowability of claim 1, the Applicant also submits that each of the claims depending from that claim (that is, all of the remaining claims of the present Application) also are allowable under 35 U.S.C. 103(a).

Dependent Claim 13

In relation to claim 13 depending from independent claim 1, the Examiner specifically stated in the aforementioned April 28th Office action that “the particular conventional composite food product employed is seen to have been an obvious matter of choice”.


Notwithstanding these comments, the Applicant respectfully traverses this rejection of claim 1. The Applicant has not found any particular reason set forth by the Examiner as to why the Examiner’s assertion is correct. More particularly, the Applicant has not found any particular

reasoning as to why it would have been obvious to one of ordinary skill in the art to modify a conventional pierogi so as to satisfy all of the aforementioned features required by the Applicant's claim 1. To the contrary, as already discussed above, it is the Applicant's position that the Applicant's claimed pierogi of claim 8 addresses problems that are not addressed by the relied-upon prior art.

Thus, for at least these additional reasons, the Applicant respectfully submits that the Applicant's dependent claim 13 is allowable under 35 U.S.C. 103(a) in view of any and all of the references relied upon by the Examiner, alone and/or in combination.

Respectfully submitted,

Date: 10/27, 2008


John T. Pienkos
Applicant

2512 W. Margaretta Ct.
Glendale, WI 53209

VIII. CLAIMS APPENDIX

The claims on appeal are:

1. An apparatus that is at least partly consumable comprising:
a pocket formed from dough, wherein the pocket has a length dimension, a width dimension and a depth dimension, and wherein each of the width dimension and the length dimension is substantially greater in extent than the depth dimension;
a portion of a food stuffing material captured within the pocket; and
a protrusion coupled to the pocket along at least most of a 90 degree segment around a perimeter that extends around the pocket and substantially encompasses the length dimension and the width dimension, wherein the protrusion is capable of being grasped and, when so grasped, the pocket is capable of being supported by the protrusion.
2. The apparatus of claim 1, wherein the protrusion is sufficiently large so that it can be grasped by way of a thumb and an index finger.
3. The apparatus of claim 1, wherein the protrusion includes a first side surface and a second side surface substantially opposite the first side, wherein none of the portion of the food stuffing material is positioned in between the first and second side surfaces of the protrusion, and wherein each of the first and side surfaces has a surface area of at least one square centimeter.
5. The apparatus of claim 1, wherein the protrusion includes dough that is integrally formed as part of the dough forming the pocket.
6. The apparatus of claim 5, wherein the protrusion includes two layers of the dough that are pressed together to form a double-layer extension.
7. The apparatus of claim 6, wherein formation of the protrusion includes an additional step of cooking to further enhance the strength of the protrusion.

8. The apparatus of claim 1, further comprising a second protrusion also coupled to the pocket.

9. The apparatus of claim 1, wherein the protrusion is an extension of at least a portion of a rim about at least a portion of the perimeter of the pocket, and wherein the protrusion is configured for being grasped by a clip.

10. The apparatus of claim 9, further comprising a clip that grasps the protrusion, wherein the clip further includes a portion that is capable of being grasped by a thumb and an index finger, and wherein the clip effectively forms a portion of the protrusion.

11. The apparatus of claim 1, further comprising a support beam that extends from within an interior of the pocket out beyond a rim of the pocket, and wherein the protrusion includes an outer portion of the support beam extending beyond the interior of the pocket, wherein the support beam is one of a solidified piece of dough and a pretzel.

13. The apparatus of claim 1, wherein the pocket is generally of the form of a pierogi.

21. The apparatus of claim 6, wherein the protrusion includes four layers of the dough that are pressed together to form a quadruple-layer extension.

22. The apparatus of claim 1, wherein the pocket is generally of the form of a ravioli.

23. The apparatus of claim 1, wherein the perimeter of the pocket includes an approximately 90 degree curved section, and wherein the protrusion is coupled along substantially all of the curved section, and wherein the length dimension is substantially greater in extent than the width dimension.

IX. EVIDENCE APPENDIX

None.

X. RELATED PROCEEDINGS APPENDIX

None.